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Supreme Court, U.S.
FILED

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No.

IN THE
SUPREME COURT OF THE UNITED STATES

JOHNNY M. EVANS, SR.

Petitioner

versus

DERIDDER MUNICIPAL FIRE & POLICE CIVIL SERVICE BOARD and THE CITY OF DERIDDER, LOUISIANA

Respondents

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES SUPREME COURT

APPENDIX - VOLUME II

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THE SUPREME COURT OF THE STATE OF LOUISIANA

JOHNNY M. EVANS, SR. NO. 2001-C-2466

VS.

DERIDDER MUNICIPAL FIRE & POLICE CIVIL SERVICE BOARD

IN RE: Deridder Municipal Fire & Police Civil Service Board et al; Deridder, City of ; - Defendant(s); Applying for Writ of Certiorari and/or Review, Parish of Beauregard, 36th Judicial District Court Div. A, Nos. C-97-1106; to the Court of Appeal, Third Circuit, No. 01-118

December 14, 2001
Granted. See Order Attached

PFC
CDK
BJJ
JPV
CDT
RLL

Supreme Court of Louisiana
December 14, 2001
/s/ Illegible
Clerk of Court, Chief Deputy for the Clerk

SUPREME COURT
STATE OF LOUISIANA

NO. 2001-C-2466

JOHNNY M. EVANS, SR.
Plaintiff - Appellant
v.
DERIDDER MUNICIPAL FIRE & POLICE CIVIL SERVICE BOARD
and THE CITY OF DERIDDER, LOUISIANA
Defendants - Appellees

PLAINTIFF/APPELLANT'S ORIGINAL BRIEF ON THE MERITS WRIT OF REVIEW TO THE COURT OF APPEAL, THIRD CIRCUIT, PARISH OF BEAUREGARD

CIVIL CASE

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OPPOSITION TO DEFENDANT'S WRIT OF REVIEW

STATEMENT OF THE CASE

The respondent, JOHNNY M. EVANS, SR., has been in law enforcement a majority of his entire life. He served twenty-two (22) years in the United States Army, in which he was in the military police for fourteen (14) years. During this time, he had a top secret clearance rating. Following his military career, Officer Evans was employed with the Beauregard Parish Sheriff's Office for two (2) years and finally with the DeRidder City Police for four and a half (4 ½) years. Law enforcement was his life.

On or about June or July, 1997, Johnny M. Evans, Sr., contacted Betty Pichon and Saul Wilson of the Narcotics Task Force due to his son's possible involvement in drug activity. Officer Evans advised

these officers that his son was beginning to have expensive things and he didn't feel as if he was making that much money at his present job. Officer Evans asked them if they would check him out to see if he was involved with drugs (Tr. p. 38). In another incident, he suspected a nephew, who was living with him, of being involved with drugs. He contacted Sergeant Pine of the DeRidder City Police, and summoned a drug detecting dog unit to search his house. The search yielded crack cocaine.

Respondent, JOHNNY M. EVANS, SR., was terminated from his employment with the DeRidder City Police Department by letter dated October 29, 1997 for allegedly disclosing information concerning the identity of a drug informant, Earnest Prater, to his son, Johnny Evans, Jr. and Eric Pickens. The

termination became effective October 31, 1997 at 4:00 o'clock p.m. Reasons for his termination were set forth in a letter from Chief of Police, Arvin Malone, dated October 29, 1997 which stated, in pertinent part:

"1. Patrolman Evans is a friend of Pickens:

A. There is no logical reason Eric would makeup such a story on a friend.

2. Eric made accusations before he was a suspect and again after becoming a suspect.

3. It is apparent Eric and Johnny Evans, Jr., knew of Earnest Prater's connection with Law Enforcement as this is the motive established by the Vernon Parish Sheriff's Department for the homicide.

A. Many times different people are thought to be Confidential Informants For Law Enforcement, sometimes true, but many times not so. Based on "Street Talk", there has been no such retaliation against people Accused of being Confidential Informants as the suspects are accused of doing. This would indicate that they most likely had a strong confirmation

from someone in position to know for certain what Prater's connection was with Law Enforcement. Officer Evans knew of this connection. Granted other Law Enforcement Personnel knew of the connection, but none of them have been accused of leaking the information to the suspects, Officer Evans has been.

Possible Motivation for Ptn. Evans to disclose the identity of Prater:

1. To protect his son from possible arrest.

   A. Knew son was suspected of possible drug activities.

2. To protect Eric Pickens from possible arrest.

   A. Eric is a friend.

Possible Reasons for Ptn. Evans to deny accusation:

1. Accusation may not be true.

2. To protect himself from possible criminal charges.

3. To protect himself from possible civil liability.

4. To protect himself from possible administrative sanctions.

5. To maintain his credibility and trust of the public, fellow officers, other law enforcement agencies, and Criminal Justice Entities, Judges, District Attorney, etc.

The respondent, Johnny Evans, Sr., was ordered to take a polygraph examination under the threat of termination of employment. (see letter from Chief Arvin Malone dated September 25, 1997 (Tr. Ex. 3). As stated by the examiner, "The results of the test indicated that Officer Evans wasn't being truthful when he denied disclosing the identity of Earnest Prater to Eric Pickens and Johnny Evans, Jr."

On November 3, 1997, the undersigned counsel filed a request for a hearing before the DeRidder Municipal Fire and Police Civil Service Board (hereinafter referred to as the "Board") challenging the employment termination of Officer Johnny M. Evans, Sr. A hearing was scheduled for December 18, 1997.

On December 18, 1997, a hearing was held to determine if the termination of Officer Johnny M. Evans, Sr., was taken in good faith for cause. The Board found that the evidence was conclusive and affirmed the termination of Officer Johnny M. Evans, Sr. (Tr. pp. 203-205). Johnny Evans, Sr. appealed to the District Court, which affirmed the Board's decision. Johnny Evans, Sr. appealed to the Third Circuit Court of Appeal which reversed the ruling of the District Court. Defendant applied to the Supreme Court for a Writ of Review which was granted and briefing schedules were set.

ARGUMENT
OPPOSITION TO ASSIGNMENT OF ERROR NO. 1:

On December 18, 1997, a hearing was conducted to determine if the termination of Officer Johnny M.

Evans, Sr., was taken in good faith for cause. The Board found that the evidence was conclusive and affirmed the termination of Officer Johnny M. Evans, Sr.

The Board relied solely on the results of the polygraph examination of Plaintiff, Johnny M. Evans, Sr., and did not take into consideration any conflicting evidence which was presented at the hearing by the undersigned counsel. **Little, if any**, evidence was adduced or exists substantiating the assumptions, innuendos and unjustified conclusions asserted in the letter of termination from Chief Arvin Malone, none of which would be sufficient, even if proven, to support the decision of the Board. Ultimately, the Board, through their counsel, David Lestage, **stated that they relied solely on the results of the polygraph test** (Tr.

p. 82 lines 18-21).

MR. LESTAGE

> "Counsel misses the point. Mr. Evans was ordered to undergo a polygraph, and it's the results of that polygraph for which Mr. Evans was fired."

At the hearing, counsel for the City of DeRidder offered hearsay statements of Eric Pickens, into evidence, over objection, alleging disclosure of the identity of a confidential informant by Officer Evans. These statements were allowed in evidence. Counsel for Mr. Evans then sought to show the myriad inconsistencies and inaccuracies of these statements. In response, counsel for the City of DeRidder objected, frequently, alleging that these statements were irrelevant .

The City of DeRidder now argues that these same statements constitute

substantive evidence sufficient to justify Officer Evans' termination.

Respondent has contended through all levels of this proceeding, i.e., Civil Service Hearing, District Court Documentary Review, Third Circuit Court of Appeal, and now to the Honorable Supreme Court of Louisiana, that his termination was without **good faith and cause.**

In order for the decision of the Civil Service Board to be found to have been made in good faith and for legal cause, there must be **sufficient evidence** to support the administrative decision. City of Abbeville v. Abbeville Fire and Police, 599 So. 2d 508 (La. App. 3 Cir. 1992) writ denied 604 So. 2d 1308.

It is respectfully submitted that **sufficient evidence** is synonymous with "**competent**" evidence. The decision of the Civil Service Board of the City of

DeRidder must be based on competent evidence. Incompetent evidence will not be considered on appeal. Ruddock v. Jefferson Parish Fire Civil Service Board, 688 So. 2d 112 (La. App. 5th Cir. 1997).

Further, the issue to be determined by the Board or by the District Court, in the event an appeal is taken to that Court, is whether the decision of the appointing authority or of the Board was "made in good faith for cause" is construed to mean that the action of the appointing authority, in order to be valid must be **both** "in good faith" and "for cause". The action of the authority must be set aside if it was not taken "for cause" even though it may have been taken in good faith. Martin v. City of St. Martinville, 321 So. 2d 532 (La. App. 3 Cir. 1975) writ denied 325 So. 2d 273.

The burden of proof of the appointing authority in a

proceeding challenging termination of a civil service employee is by a preponderance of the evidence. The facts must be clearly established, they need not be established beyond a reasonable doubt as in a criminal case. Ruddock v. Jefferson Parish Fire Civil Service Board, supra.

It is respectfully submitted that conflicting and contradictory hearsay statements do not qualify as "competent" evidence. Further, Movant contends and the Third Circuit Court of Appeal agreed in their decision, that having found legal error in the Board's and Trial Court's decision to admit the polygraph results and the polygrapher's testimony into evidence, a determination must be made as to whether or not there is sufficient evidence to support the Board's actions. The Third Circuit Court of Appeal stated "Based on this

record, we conclude that the Board **did not possess sufficient "cause" to terminate him."**

OPPOSITION TO ASSIGNMENT OF ERROR NO. 2:

A) "Nothing in Daubert, infra., foreclosed, as a constitutional matter, per se exclusionary rules for certain types of expert or scientific evidence" United States v. Scheffer, 523 U.S. 303, 118 S.Ct. 1261, 140 L.Ed.2d 413 (La. 1998). (emphasis added).

This same rationale should apply to jurisprudence, as the United States Supreme Court concluded (in footnote 7):

> "[i]t would be an odd inversion of our heirarchy of laws if altering or interpreting a rule of evidence worked a corresponding change in the meaning of the Constitution" Scheffer, supra.

However, in the event a per se exclusion of such evidence is preferred over a case by case review, this record is extremely deficient of facts requisite to

admissibility. The Third Circuit Court of Appeals obviously observed these inadequacies in the record.

Concerning the qualifications of the test administrator, the record is absent evidence that Mr. Trahan had previously qualified as an expert, or that a substantive portion of his income is derived through the use of polygraphs.

In determining whether the expert is proposing to testify to opinion based on scientific knowledge, the

record must include an inquiry into the evidentiary relevance and reliability of the principles that underline a proposed submission. Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L.Ed. 2d 469 (1993).

Such factors include:

a.) What is the known or potential rate of error? Daubert, @ p. 2797

b.) What standards exist to control the techniques operation? Daubert, @ p. 2797

c.) Can the hypothesis be and has it been tested? Daubert, @ p. 2796

d.) Has the theory or technique been subjected to peer review and publication? Daubert, @ p. 2797

e.) What is the degree of acceptance of the technique within the relevant community? Daubert, @ p. 2797

While the polygraphist in this case submitted an unbelievable rate of error of one (1%) percent, the most telling disclosure was that this rate of error is not

verifiable.

"Q. Have you ever made a mistake in any of these five or six hundred polygraph examinations you've conducted?

A. Yes, sir, I have.

Q. And about how many?

A. Well, verifiable would be difficult; but I would say the number would be between five and ten." (Tr. p. 136 lines 8-13)

This record is somewhat silent on the existence of standards to control the techniques operation. Likewise, it is respectfully submitted that there are no established procedural safeguards which would safeguard the administration of the polygraph. The machine used on Officer Evans was the Arther VI (Tr. p. 125), which, according to the polygraphist is not in general use.

"Q. And was the polygraph used for the examination of Mr. Evans an instrument in general use?

A. Well, it's not an instrument in general use, because Dick Arther has polygraphs made to his specific - - to his specifications, as opposed to nowadays you can get them that's computerized and people go with computer. You can get polygraphs that are electronically enhanced. The Arther VI that I use is not electronically enhanced. In other words, the recording is an actual recording from the person; it is not enhanced to get a better reading off of it." (Trans. p. 124 lines 21-25 and p. 125 lines 1-5)

The most notable disclosure by this polygraphist was a total lack of knowledge as to how his machine (Arther VI) functioned.

"Q. You're not an engineer of any kind?

A. No, sir, I'm not.

Q. Electric engineer or anything of that sort?

A. No, sir.

Q. And you didn't build this polygraph?

A. No, sir, I did not.

Q. And you don't know, from an engineering standpoint, what makes that part of it work?

A. I am not an electronic engineer; I don't know what makes it work" (Tr. p. 129 lines 10-19).

Yet, notwithstanding this total lack of knowledge of the inner functions of the Arther VI, this polygraphist performs his own repairs when his machine malfunctions or breaks.

"Q. You indicated, in response to Mr. Lestage's questions, you're not an engineer. You don't know how that machine works, it's inner - - I mean, you don't know its inner functioning. You couldn't take it apart and put it back together.

A. Well, I don't say I couldn't do that, because I do my own repairs. But as far as taking - - looking at the little transformer and know why that transformer does all this, no. But if there's something wrong with my polygraph, I generally fix it myself. If that transformer needs changing, I'll order a new one and change it. But as far as what makes the transformer, you know, affect the components inside, no" (Tr. p. 161 lines 18-26, p. 162 lines 1-3).

The paradigm in the State of Louisiana is the use of the Intoxilyzer 5000 for determination of intoxication.

It can be presumed that few, if any, officers administering the Intoxilyzer 5000 know the inner functions of this machine or how to repair it, although they are certified to administer the test. Consistent with its wide spread use, the State established extensive safeguards, through the Louisiana Registry, (Title 55 Public Safety), for the use, maintenance, calibration and admissibility of test results. The machine must be calibrated with a known sample within four (4) months of administration of a test to be used in evidence at trial, Louisiana Registry, (Title 55 Public Safety Chap. 5 Section 501) and a certificate issued and filed in the records of the Clerk of Court in the judicial district in which the test is administered. Each inspector must be periodically re-certified, Louisiana Registry, (Title 55 Public Safety Chap. 5 Section 507). These safeguards apply to detection of blood alcohol content, a much

more exacting science than determining the veracity of statements made by a test subject.

Yet, this record is silent on the existence of any such rules or regulations for the Arther VI.

This polygraphist disclosed other factors suggestive of the abstract, inexact and subjective nature of polygraphs.

1. "Q. We'll get to that in a minute. One other thing I want to touch on that you just gave in your explanation. So now you're telling me that during this test or to arrive at your conclusions, you relied on body language and demeanor of Johnny Evans.

   A. Well, it has - - It has some - - It has some play in it; but the bottom line is the chart - - is the chart analysis." (Tr. p. 167 lines 15-21)

2. "Q. And further, you stated, and I'll quote, "A positive truthful person would possibly have answered.., "quote, " I will pass because I know I did not do this thing,"

unquote, "etcetera." So what I'm getting to is, obviously, "should do good" is not a positive response in that, Mr. Trahan?

A. Well, no, it's not a positive response. You know, I'm going to pass this," is going to be a positive response." (Tr. p. 172 lines 2-6)

3. " . . . He swallowed at that particular point. That's a sign of relief from a person that was stressed by the particular question - -" (Tr. p. 157 lines 7 - 9)

4. " . . . the liar will tend to rate the polygraph on the low end of the scale. A truthful person would tend to rate it on a higher end of the scale . . . " (Tr. p. 131 lines 22-24)

5. " . . . when a questions places him under stress and they are thinking about their heart rate increasing and everything, they're going to change their breathing; and it's going to have a direct - - reflect directly down on the heart - - " (Tr. p. 149 lines 13-17) **(Emphasis Added)**

6. " . . .Mr. Evans, in my opinion did not tell the entire truth on this particular issue"

(Tr. p. 146 lines 11-12) (**Emphasis Added)**

7. "Q . . . I want to revisit one question. Can you distinguish between partial truths and lies on your test?"

   A. No, absolutely no." (Tr. p. 164 lines 21-23)

8. "Q. He interpreted the question to mean that you were indicating he was telling you lies on all questions up to that point."

   A. No; he didn't give me any indication of that. He didn't - - - Normally, when a person feels that way, they'll look at me and say: What, you're calling me a liar? And then I have to explain to them: No, no, no; I'm not calling you a liar; what I'm trying to do is to get theses areas in your past out of they way so there's no - - - something don't show up on the chart that could be misinterpreted as that question." (Tr. p. 179 lines 2-4)

As stated by the Honorable Third Circuit Court of Appeal:

"While the machine appears to produce straightforward and reliable physiological measurements, the examiner's method of questioning, as well as his or her interpretation of the results, may not. Therein lies an acute danger. "[T]he individual skill and training of examiners . . . affects the reliability of a polygraph. Clearly, 'bells do not go off' at the moment someone tells a lie. Rather, the polygraph's ability to discern the truth rests in the skill of examiners. 'Although an adequate instrument is essential for proper testing, the role of the examiner in interviewing the examinee, designing test questions, and evaluating and interpreting the polygram is much more critical to an accurate diagnosis than is the mechanical function of the polygraph itself.' Thus, the skill of examiners fundamentally affects the ultimate reliability of the test.

However, one of the main reasons which bolsters polygraphs' prohibition in legal proceedings involves, not only the issue concerning its reliability but, also, its probative value or relevancy. Apparently, **there is no scientifically proven cause and effect connection between an increase in the pertinent physiological reactions and "truth telling."** Indeed, some authors noted that "[t]he heart of the present critique of

> the polygraph is that **no theory that ties deception (or any criminal activity) with physiological reactions has been formulated.** Furthermore, there is 'no known physiological response that is unique to deception,' and all physiological measures used for polygraph tests are sensitive to, and can be elicited by, a host of factors other than deception or criminal activity. If deception is not uniquely related to physiological reactions, and theory cannot explain the nature of the relationship, it is impossible to predict the conditions under which polygraph test results will be accurate or inaccurate" (Yvonne Koontz Sening, *Heads or Tails: The Employee Polygraph Protection Act,* 39 CATH.U.L. REV. 235, 264 (1989); Johnny M. Evans, Sr. v. DeRidder Municipal Fire & Police Civil Service Board, State of Louisiana, Court of Appeal, Third Circuit, Docket No. 01-118.

This record answers the remaining Daubert, supra, requisites in much the same manner. "There is simply no consensus that polygraph evidence is reliable". United States v. Scheffer, supra.

The opinion of the polygrapher/polygraphist is also

subject to the balancing test set forth in Louisiana Code of Evidence Article 403.

> "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or waste of time."

This is the additional basis considered by the Third Circuit, which the City of DeRidder disregards in suggesting that the opinion formulates a per se exclusion, considering ONLY Louisiana Code of Evidence Articles 607, 608 and U.S. v. Scheffer, supra.

Officer Evans was terminated from his employment solely as a result of the polygraph results.

MR. LESTAGE:

> ". . . Counsel misses the point. Mr. Evans was ordered to undergo a polygraph, and it's the results of that polygraph for which Mr. Evans was fired." (Tr. p. 82 lines 19-21)

MR. LESTAGE:

> ". . . I object to that. He asked - - He ordered the man, Mr. Evans, Sr., to undergo a polygraph examination to help in that determination. If the man had passed, he'd still be on force and on salary. I mean, it's that simple." (Tr. p. 115 lines 1-6)

It is not a difficult transition to consider the test result having identical conclusive effect with the members comprising the Civil Service Board at Officer Evans' hearing.

> "Our fundamental concern is that the trier of fact is apt to give almost conclusive weight to the polygraph expert's opinion". State v. Catanese, 368 So.2d 975 (La. 1979).

B) Counsel for DeRidder also argues that the Third Circuit Court erred in not relying upon Louisiana Code of Evidence Articles 701-704. Louisiana Code of Evidence Article 702 establishes a procedure for an

expert to testify only as to matters that are calculated to be helpful to the jury and/or trier of fact. (Emphasis added). This procedure is buffered and/or balanced by Louisiana Code of Evidence Article 403 giving due consideration of the probative value/ prejudicial effect of the expert's opinion.

> **"Credibility, however, is for the jury - the jury is the lie detector in the courtroom."** State v. Foret, 628 So. 2d 1116, 1128 (La. 1993).

In Foret, supra, this Honorable Court considered the admission of a psychotherapist's opinion on an abuse victims' credibility. After consideration, this Court decided to allow admission of such opinions for the limited purpose of rebutting the victim's credibility, limited disclosures, or recanting of the testimony. Ultimately, this Honorable Court found that the use of the psychotherapist's opinion was not so limited, his elicited opinion constituted an improper comment on

the victim's credibility, and served to unduly prejudice the defendant.

Likewise, in the instant case, existence of prejudice is overwhelming. The opinion of the polygraph expert, bolstered an allegation of wrongdoing by Officer Evans. No other competent evidence exists which the opinion of the polygrapher would assist the trier of fact in determining/understanding.

In Foret, supra, the Court deemed it necessary to prohibit the testimony of a highly-educated psychotherapist on rendering an opinion concerning an abuse victim's credibility. Consistently, in the case at hand, this Court should prohibit an opinion by a polygrapher, whose only education requires a six week course in order to become licensed in this field, as to whether an officer in a civil service hearing made a prior truthful/untruthful statement concerning an

allegation of wrongdoing. In State v. Catanese, supra, relied upon by the City of DeRidder, the trial judge commendably established an eleven (11) point prerequisite to introduction of polygraph evidence, the first and foremost of which is the necessity of a "competent examiner". Of the criteria to make this determination it was suggested that the examiner "...have a baccalaureate degree or the judge be satisfied that he have equivalent experience and literacy [and] a working knowledge of psychology;" Catanese, supra at P. 976, footnote 1 (emphasis added).

Whether submitted to attack credibility or as substantive evidence, this record does not support admissibility.

OPPOSITION TO ASSIGNMENT OF ERROR NO. 3, 4 & 5:

The hearsay statements of Eric Pickens contain a plethora of inconsistencies. These inconsistencies

were, in part, disclosed during Officer Evans' termination hearing (although objected to by counsel for the City of DeRidder as being irrelevant). Simply put they are the statements of an individual who participated in a murder, made to feign cooperation with law enforcement, cast another party with involvement, and possible revenge for Officer Evans arresting him on August 14 (Tr. p. 87, lines 13-17). As noted by the Honorable Third Circuit Court of Appeal, the statements contain, at a minimum, two (2) crucial contradictions. Many others, however, exist.

In the statement given on August 28, 1997, Mr. Pickens made no mention of being a participant in the murder of Ernest Prater. Additionally, he stated that Johnny Evans, Jr., was not present when this disclosure was made.

Next, in his statement given on August 31, 1997,

Mr. Pickens disclosed that the information came from Johnny Evans, Jr.:

"Q. Okay, who told uh, who told that Ernest was ratting people out or . . . ?

A. Johnny.

Q. How did he know?

A. He said those dudes on Bishop told him.

Q. On Bishop?

A. He didn't say no names. He said some niggers on Bishop told me that Ernie was the one ratting us out.

Q. He never told you nobody else at any time, had he . . he had learnt ...that Ernest, that was the first that you knew Ernest was ratting?

A. Yeah, then I went over there and him and his daddy was talking about it."

The pronoun "him" used in this last statement can only refer to Johnny Evans, Jr., who was the individual being discussed in pp. 1-8 of that statement.

Thus, Johnny Evans, Jr., revealed that this information

came from "those dudes on Bishop" street. Further, this statement was made at a location other than the home of Johnny Evans, Sr., as Mr. Pickens indicated, "Yeah, then I went over there . . . "

In the questioning of Police Chief Arvin Malone, it was revealed that Eric Pickens had made an undercover purchase of drugs from J.J. Johnson.

MR. LESTAGE:

"Again, Mr. Chairman, I'm going to have to object. Whether any of us know J.J. Johnson is beside the point. It's just not relevant.

CHAIRMAN WILLIAMS:

Sustained.

MR. JONES

I can't get into this other lie to show this last inconsistency, Mr. Chairman?

CHAIRMAN WILLIAMS

No, sir.

MR. JONES

Well, I'd ask to proffer it in, then. And I need to ask Chief Malone a questions in order to complete my proffer.

CHAIRMAN WILLIAMS:

Okay.

Q. (Mr. Jones) Chief Malone, were you aware that on August 16, 1997, Eric Pickens did an undercover buy from J.J. Johnson of drugs?

A. I was aware there was some involvement there. I don't know all of the details on it, but I was aware that there was some transaction there somehow.

MR. JONES:

That completes my proffer on that question, Mr. Chairman"(Tr. p. 107 lines 1-25 and p. 108 l 1)

Yet, in his statement of August 31, 1997, Mr. Pickens indicated a lack of knowledge of J.J. Johnson.

"Q. Just you there. And he told you that , he had turned you and several more . . . J.J., who is he referring to as J.J.?

A. It's a dude named J.J. I don't know him, though."

Accordingly, it is respectfully submitted that the Honorable Third Circuit Court of Appeal correctly found these statement to lack credibility and trustworthiness.

Louisiana Code of Evidence Article 804(B)3 provides an exception to the hearsay rule for statements against interest. Mr. Pickens' statement on August 28, 1997 to Officer Johnson, Pine and Gott did not subject him to criminal liability. It is not a statement against his interest. At no time during that statement did he profess to be a participant in or have distinct knowledge of the murder of Ernest Prater. Additionally, its inconsistency with the later statement given on August 31, 1997 gravitates toward inadmissibility under the hearsay exception provided by Article 804(B)6.

As to the admissibility of the statement given on

August 31, 1997, the United States Supreme Court, in Williamson v. United States, 512 U.S. 594, 114 S. Ct. 2431 (1994), held that the term "statement" in Federal Rule 804(B)(3), does not refer to an extended declaration such as a report or narrative in its entirety. Louisiana Code of Evidence Rule 804(B)(3) is identical to the federal counterpart.

> "The fact that a person is making a broadly self-inculpatory statement does not make more credible the confessions non-self-inculpatory parts. One of the most effective ways to lie is to mix falsehood with truth . . . " Williamson, supra, p. 2435.

The Williamson, supra, majority held that the Rule did not authorize admission of non-self-inculpatory statements made during the course of another's confession. This Honorable Court adopted the Williamson rationale in State v. Smith, 643 So. 2d. 1221 (La. 1994) Subsequently, this interpretation was

followed in State v. Coates, 661 So. 2d 571 (La. App. 2nd Cir. 1995), wherein the declarant implicated himself in the crime but attempted to place the ultimate blame on the defendant.

Finally, the City of DeRidder urges the remand of this matter for rehearing due to the conclusion of criminal proceedings against its previously "unavailable" witness. In urging the admissibility of these statements under Article 804(B)(3) the City of DeRidder should concede that the portions pertinent to this proceeding were not "self-inculpatory". The Fifth Amendment, asserted by Pickens at the Civil Service hearing, does not protect against non-inculpatory statements or disclosures. The City of DeRidder had the right and/or obligation to request that the Chairman direct the witness to answer the questions relevant to that hearing, notwithstanding the witnesses urgence of

the Fifth Amendment privilege against self incrimination. They chose not to do so. Nor would live testimony by Mr. Pickens negate the existence of inconsistencies and contradictions which rendered his hearsay statement untrustworthy. As counsel for the City of DeRidder astutely pointed out during this hearing,

> ". . .We're not here about Eric Pickens and whether he told the right version the first time, the second time, the third time, or whether he can reconcile all three versions. He might be able to reconcile why all three are true. But that's not for us, and its not - - certainly not for Chief Malone to decide now, nor to have decided on October 29. And we'd object to this line of questioning." (Tr. p. 105 lines 17-25, p. 106 lines 1-2)

CONCLUSION

Officer Johnny Evans, Sr., was a member of the United States Army for twenty-two (22) years and was honorably discharged at the rank of E-7, Sergeant First Class. He was classified with a top secret clearance rating for the last eighteen (18) of those years (Tr. p. 48, lines 13-14). After two (2) years with the Beauregard Parish Sheriff's Office, he joined the force of the DeRidder City Police on April 5, 1993. While with the DeRidder City Police he reported his own family members to the Beauregard Parish Narcotics Task Force for possible drug involvement. His exemplary record itself contradicts the allegations made against him. It is respectfully and humbly requested that this Honorable Court affirm the decision of the Third Circuit, Court of Appeal and restore Johnny Evans, Sr. to his rightful position.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ORIGINAL BRIEF IN OPPOSITION TO DEFENDANT'S WRIT OF REVIEW has been forwarded to counsel for defendants, David R. Lestage, Attorney at Law at 207 W. 2nd Street, P.O. Box 880, DeRidder, Louisiana 70634 , and Honorable Kenneth J. deBlanc, Clerk of the Third Circuit Court of Appeal, P.O. Box 16577, Lake Charles, Louisiana 71616 by mailing the same, postage pre-paid and properly addressed.

DeRidder, Louisiana, this 25th day of January, 2002.

/s/ Charles A. Sam Jones, III
CHARLES A. "SAM" JONES, III

SUPREME COURT OF LOUISIANA

No. 01-C-2466

JOHNNY M. EVANS, SR.

versus

DERIDDER MUNICIPAL FIRE AND POLICE CIVIL SERVICE BOARD

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL, THIRD CIRCUIT, PARISH OF BEAUREGARD

VICTORY, J.

We granted this writ application to determine whether the finding of the DeRidder Municipal Fire and Police Civil Service Board (the "Board"), that Johnny Evans, Sr. ("Evans") was dismissed in good faith and for cause, was supported by competent evidence. After reviewing the facts and the applicable law, we find that there is competent evidence in the record to support the Board's ruling.

FACTS AND PROCEDURAL HISTORY

On August 14, 1997, Earnest Prater, Jr. ("Prater") was arrested by DeRidder City Police in connection with a drive-by shooting. Evans, a member of the DeRidder City Police force, conducted the interview of Prater and at Prater's request, contacted

Beauregard Parish Deputy Sheriff Betty Pichon ("Pichon"), a member of the Narcotics Task Force. Prater told Pichon that he knew someone who had drugs, which led the police, including Evans, to the home of Eric Pickens ("Pickens"), where drugs were found and Pickens was arrested. Prater, who was co-operating with the police, was not booked and was released. Pickens was released on bond. On August 28, 1997, Prater was murdered. On August 28, 1997, Pichon took Pickens to the DeRidder Police Department and advised Sergeant John Gott that Pickens possibly had information concerning a motive in the murder of Prater. Pickens was not a suspect at that time. However, Pickens told Sergeant Gott and other officers that some time the week before, while Pickens was at Evans' residence, Evans told him that Prater was working for the police and that Prater had "busted" Pickens and another person. On August 31, 1997, Pickens gave a statement to Vernon Parish Sheriff s Deputies that Evans had told Pickens and Evans' son, Johnny Evans, Jr. ("Johnny"), that Prater had turned Pickens and another person in to the authorities. In this statement, Pickens also admitted that he was involved, to some extent, in the murder of Prater. Pickens later pled guilty to manslaughter in conne:ction with Prater's death. Johnny was also

arrested in the murder of Prater, and was convicted of second degree murder.

Upon learning of Pickens' allegations that Evans had disclosed confidential information which may have led Pickens and Johnny to kill Prater, DeRidder Chief ofPolice Arvin Malone ("Chief Malone") began an investigation. On September 25, 1997, Chief Malone sent a letter to Evans, informing him that he was under investigation and informing him of his rights. The letter also explained that Evans would have to take a polygraph examination.[1]

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[1] This type of polygraph is a machine that records and graphs three or four physical responses. These are galvanic skin response (sweating of the palms), the mean of the systolic and diastolic blood pressures, respiration rate, and sometimes changes in the blood flow in the tip of the index finger. These responses are measured by instruments placed on the subject being tested, and are made visible by simultaneous and continuous recording on a chart. The machine which connects the subject and the chart does not detect deception. Rather, the examiner studies the readings which are interpreted as giving indications of deception. The underlying theory of polygraphy is that conscious effort at deception by a rational individual causes involuntary and uncontrollable physiological responses that include measurable reactions in the bodily functions being monitored. It is up to the examiner to determine the suitability of the subject for testing, to formulate the proper test questions, to establish the

necessary rapport with the subject, to detect attempts to mask or create reactions on the chart, and to interpret the charts. Sheila K. Hyatt, Developments in the Law of Scientific Evidence: The Admissibility of Polygraph Evidence, 18 J.NAALJ 171, 179 (Fall, 1998)

In October, Evans took a polygraph examination administered by ABC Investigators, Inc., and as a result, the polygraphist, Pete Trahan, notified Chief Malone that Evans "has not told the entire truth to all of the pertinent questions" on the polygraph test.[2] As a result of the polygraph, Chief Malone recommended to Mayor Gerald Johnson that Evans be dismissed from his employment effective October 31, 1997. Mayor Johnson agreed and approved the dismissal. Evans appealed his dismissal to the Board, which held a hearing on December 18, 1997. At the hearing, Evans testified that he did not tell Pickens or his son that Prater was a confidential informant. The City attorney sought to present the testimony of Pickens and Johnny regarding the statements Pickens made to the police, but, because criminal charges were then pending against them in the death of Prater, they invoked their Fifth Amendment privileges and refused to testify .Thus, the City introduced the two statements

[2]The pertinent questions were: (I) "Do you know for sure who, informed on Ernest Prater?" (2) "Did you tell any unauthorized person that Ernest Prater was an informant?" (3) "Did you tell Eric Pickens that Ernest Prater was an informant?" (4) "Did you tell Johnny Evans, Jr. that Ernest Prater was an informant?". Evans answered "No" to each of these questions.

Pickens made to the authorities. Chief Malone testified that, because of the conflicting statements by Pickens and Evans, he ordered Evans to take a polygraph, and that, because Evans failed the polygraph, he was fired. The polygraphist also testified regarding his training and experience, his testing method, the questions asked on the test, and his opinion that Evans had not told the entire truth on the key questions at issue, namely, whether he had told Pickens that Prater was a confidential informant.

Based on the evidence presented, the Board found that the alleged violation by Evans did occur, and that the appointing authority acted in good faith and for cause in the discharge of Evans, and upheld the dismissal. On October 9, 2000, the trial court affirmed, finding that the Board's decision was not arbitrary and capricious and was supported by the evidence. Contrary to Evans' arguments, the trial court found that Pickens' statements were

admissible because hearsay is admissible in administrative hearings, and the statements were an exception to the hearsay rule under La. C. E. 804(B)(3) as statements against interest. The trial court held that the results of the polygraph are admissible in administrative hearings within judicial discretion on a case-by-case basis. The Third Circuit Court of Appeal reversed, finding that the polygraph: (1) was inadmissible as unreliable and irrelevant; (2) that it usurped the fact-finder's role; and, (3) was inadmissible under La. C.E. 607 to attack a witness's credibility. *Evans v. DeRidder Municipal Fire & Police Civil Service Board,* 01-118 (La. App. 3 Cir. 6/27/01),789 So. 2d 752. Because it ruled that the trial court committed legal error in admitting the polygraph, the court of appeal conducted a *de novo* review of the record and found that one of Pickens ' statements to the police was inadmissible as well, in that it did not fall under any hearsay exception and was inconsistent with the other statement he made. As a result of these conclusions, the court of appeal found that the Board did not possess sufficient cause to terminate Evans, and restored Evans to his former position. We granted the City's writ.

Evans v. DeRidder Municipal Fire & Police Civil Service Board, 01-2466 (La. 12/1.4/01.).

DISCUSSION

"In civil service disciplinary cases, an appellate court is presented with a multifaceted review function." *Bannister v. Dept. of Streets,* 95-C-0404 (La. 1/16/96), 666 So. 2d 641.,647 (citing *Waiters v. Department of Police of the City of New Orleans,* 454 So. 2d 106 (La. 1.984». "First, as in other civil matters, deference will be given to the factual conclusions of the Commissioner ." *Id.* The Commissioner. or Board. has a duty to decide independently from the facts presented whether the appointing authority [the Mayor] had good or lawful cause for taking the disciplinary action, and, if so, whether the punishment imposed is commensurate with the dereliction. *Waiters, supra.* "Hence, in deciding whether to affirm the Commission's factual findings, a reviewing court should apply the clearly wrong or manifest error rule prescribed generally for appellate review ." *Id.* "Second, in evaluating the Commission's determination as to whether the disciplinary action is both based on legal cause and commensurate with the infraction, the court, should

not modify the Commission's order unless it is arbitrary , capricious, or characterized by abuse of discretion." *Id.*

Under La. Const. Art. X, § 8(A), employees with permanent status in the classified civil service may be disciplined only for cause expressed in writing. Further, under the Louisiana Constitution, "cause" for the dismissal of such a person includes conduct prejudicial to the public service involved or detrimental to its efficient operation. La. Const. art. X, § 8(A). Here, there is no dispute that if Evans disclosed the confidential information, there would be sufficient cause for his dismissal.

The primary issue in this case is whether the evidence introduced at the administrative hearing to prove that Evans disclosed confidential information was admissible. In administrative hearings, the hearing officer has the discretion to admit evidence that would otherwise be inadmissible under the Louisiana Code of Evidence. *Chaisson v. Cajun Bag & Supply Co.,* 97-1255 (La. 3/4/98),708 So. 2d 375,381. Rule 10.4 of the Rules of Civil Service Commission provide that "[t]he rules of evidence as applied in civil

trials before the courts of this state need not be strictly complied with but the board shall limit evidence to matters having a reasonable l relevance to the issues before the board." Further, the findings of the Board must be based on competent evidence. *Chaisson, supra,. Gant v. Department of Police,* 99- 1351 (La. App. 4 Cir. 1/5/00), 750 So. 2d 382, 387, *writ denied,* 00-0688 (La. 4/20/00),760 So. 2d 1161; *Cittadino v. Department of Police,* 558 So. 2d 1311,1315 (La. App. 4 Cir. 1990).

Evans claims, and the appellate court found, that the polygraph results were inadmissible at the administrative hearing before the Board. We disagree.[3] Police officers throughout the land are routinely subjected to polygraph tests, in both the pre-employment screening process and in investigatory actions involving official misconduct. In fact, the Employee Polygraph Protection Act of 1988, which generally prohibits private employers from using polygraphs in the workplace, contains an exception for federal, state and local government employees. *See* 29 U .S.C. 2001- 2008.[4] Further, Louisiana courts have long recognized that a civil service

employee may be ordered to take a polygraph, and that the employee can be suspended or discharged for failing to take a polygraph. *See Creadeur v. Department of Public Safety, Div. of State Police,* 364 So. 2d 155 (La. App. 1 Cir. 1978); *Lemoine v. Department of Police,*

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[3]We make no ruling on whether a polygraph is admissible in a civil trial outside the context of an appeal of a Civil Service Board ruling in a Civil Service employee disciplinary proceeding.

[4]The Act prohibits the use of lie detector tests by private employers except under limited circumstances. 29 U.S.C. 2006 (d)-(t). Further, an employer may not discharge, discipline, discriminate, or deny employment or promotion on the basis of an employee' s refusal to take a lie detector test. Private employer exemptions to the Polygraph Protection Act include those relating to ongoing investigations, security services, and drug companies.

301 So. 2d 396 (La. App. 4 Cir. 1.974); *Frey v. Department of Police,* 288 So. 2d 410 (La. App. 4 Cir. 1973); *Dieck v Department of Police,* 266 So. 2d 500 (La. App. 4 Cir.1972); *Clayton v. New Orleans Police Dept,* 236 So. 2d 548 (La. App.4 Cir.), *writ denied,* 239 So. 2d 363 (La. 1970); *Roux v. New Orleans Police Dept,* 223 So. 2d 905 (La. App. 4 Cir.), *writ denied,* 227 So. 2d 148 (La. 1969); *see also Jackson v. Hudspeth Mental Retardation Center,* 573 So. 2d 750 (Miss. 1990) (where the Supreme Court of Mississippi held that

a civil service employees could be ordered to take a polygraph, and could be fired for refusing to submit to the polygraph). However, nothing a police officer says in a polygraph can be used against him in a subsequent criminal proceeding. *See Garrity v. New Jersey,* 385 U.S. 493,87 S.Ct. 616, 17 L.Ed.2d 562 (1967) (holding that "the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under the threat of removal from office, and that it extends to all. .."); *see also Gardner v. Broderick,* 392 U.S. 273,88 S.Ct. 1913,20 L.Ed.2d 1082 (1968) (policeman who refused to waive his constitutional privilege against self-incrimination in connection with a grand jury proceeding investigating alleged bribery and corruption of police officers, cannot be discharged for his refusal to waive his rights).

This Court has held that polygraph results are per se inadmissible in criminal trials. *State v. Catanese,* 368 So. 2d 975 (La. 1979) (holding that "(a)lthough we conclude that polygraph evidence is inadmissible in criminal trials, the reasons for our decision do not prevent its introduction in post trial proceedings"). In *Catanese,* this

Court expressed the following policy reasons for the per se exclusion of polygraph results in criminal trials:

> (1) that the trier of fact would give conclusive weight to the polygraph expert's opinion;
>
> (2) that the polygraph technique is only capable of a high degree of accuracy when conducted under controlled conditions by an examiner who is highly qualified, and, in Louisiana, there are no laws providing for the licensing, regulating and disciplining of polygraph operators; and
>
> (3) that extensive procedural safeguards need to be established by courts or legislators before polygraphs are allowed to be introduced at trial.

368 So.2d at 981-982.

However, a leading commentator has advanced a number of reasons for treating evidentiary issues in administrative proceedings differently, including: (1) administrative proceedings may encompass both legislative and adjudicative functions; (2) juries are not involved and the factfinder is usually a person with special expertise in the subject matter of the inquiry; (3) the judicial officer also exercises investigative functions; and (4) non-lawyers frequently are involved in the process. Frank I. Maraist, Louisiana Civil Law Treatise: Evidence and Proof, Vol. 19, § 1.2, p. 6 (1999). Further, contrary to the policy concerns expressed in *Catanese* relative to

criminal trials, in an administrative proceeding concerning disciplinary action against a police officer, "appellant's position as a police officer, burdened with the additional distinguishing feature of his employment that he is a symbol of public trust and law enforcement who must remain above all suspicion which might tend to lessen this image and that of the entire police department, demand(s] an immediate corroboration of his statement denying any wrongdoing. ..," *Frey, supra* at 412, In addition, in 1980, after the decision in *Catanese,* Louisiana enacted a statute regulating polygraphists, La. R.S. 37 :2831, *et seq.* We find that these policy reason support the admissibility of the polygraph results in this case.

Further, Chief Malone was faced with a very serious accusation against one of his police officers, as it involved the possible disclosure of confidential information which may have led to the murder of the informant, In the face of Evans' denial, Chief Malone had the right, under both state and federal law, to order Evans to take a polygraph test. Surely he should have the right to use this evidence at an administrative hearing to justify his decision recommending that Evans be dismissed.

Having found no reason for barring the admission of the polygraph evidence in this case, we must now determine whether the results of this polygraph test were l admissible in the administrative hearing as "competent" evidence, In *Chaisson,* we held that "competent" evidence was evidence that ""has some degree ot reliability and trustworthiness and is of the type that reasonable persons would rely upon" and that "this determination must be made on a case-by-case basis under the particular facts and circumstances." 708 So. 2d at 382. "The reviewing court must evaluate the competency of the evidence under the manifest error standard." *Id.* At trial, the polygraphist testified that he had been licensed in the State of Louisiana since 1985 to conduct polygraphs, that he had conducted between 500-600 polygraphs, that he was board certified, and that he conducted polygraphs for numerous state agencies. He admitted that the polygraph was not lOO % accurate and was cross-examined vigorously on the possible inaccuracies of the polygraph. Sheriff Malone testified that he considered the possibility that Evans' polygraph results may not have been accurate in making his decision to fire Evans. Finally, no irregularities in the test were established

that would be grounds for excluding the polygraph in this case. *See Arnold v. New Orleans Police Dept.*, 383 So. 2d 810 (La. App. 4 Cir.), *writ denied,* 385 So. 2d 274 (La. 1980) (finding that the polygraph was inadmissible because the police officer and the third party were so intoxicated that their memory of the events was not genuinely reliable).

As previously stated, the Board ruled that the polygraph results were admissible, as it was entitled to do in its discretion. Having reviewed this ruling under the manifest error standard, we find that the polygraph evidence in this case was competent evidence.

Finally, the Board determined the proper weight to be given the polygraph results, as the polygraphist was vigorously cross-examined on the accuracy and methodology of the testing procedures. After weighing the evidence, the Board found that "the evidence and testimony presented to the B9ard established that the alleged violations did occur" and that "the appointing authority acted in good faith and for cause in the disciplinary action taken against Officer Evans."

Just as police officers can be fired for failing to submit to a polygraph when ordered to do so if the request is reasonable under the circumstances, police officers can be fired if they fail a polygraph. Chief Malone was entitled to present the evidence to the Board that he relied upon in making his decision to recommend Evans' dismissal. Indeed, it would be ludicrous if the appointing authority, in this case the mayor, could fire a police officer based on the results of a polygraph test he was entitled to obtain, but that the appointing authority could not present the evidence to justify his decision to fire the officer at the administrative hearing before the Board. Therefore, we find that the results of a properly administered polygraph are admissible in an administrative hearing before the Board, held to review whether the appointing authority had good or lawful cause for taking disciplinary action against a police officer. It is the province of the Board to determine the weight to be given this evidence. Further, in this case, the Board had other evidence to support the allegation that Evans disclosed confidential information. We find that the Board was not clearly wrong in admitting the

polygraph into evidence in order to determine whether Evans was dismissed for cause.[5]

Evans also argues, and the coul1 of appeal agreed, that the out-of-court statements made by Pickens were inadmissible hearsay. On August 28, 1997, Pickens gave a statement of DeRidder Police Officers as follows:

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[5]We also disagree with the court of appeal's reliance on *United States v. Schelfer,* 523 U.S. 303, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998), in ruling that the polygraph was inadmissible. *Schelfer* merely upheld the Court of Military Justice' s per se statutory rule against the admission of P91ygraph evidence in court martial proceedings in the face of a defendant's constitutional challenge that such an exclusion violated the right of an accused to present a defense under the Fifth and Sixth Amendments. In fact, the Court in *Schelfer* noted the vast use of polygraph tests by the government, primarily in the field of personnel screening, and pointed out that these "out of court uses of polygraph techniques obviously differ in character from, and carry less severe consequences than, the use of polygraphs as evidence in criminal trials." 523 U.S. at 312, n. 8.

> ...that some time last week he was at J ohnny Evans, Sr. residence on Louise St. He stated that Johnny, Sr. told him in the living room of the res. that Ernest was working for the police, Eric stated that Johnny, Sr., then stated that Ernest had busted Eric and J.J. Johnson. Eric stated that Johnny, Sr. stated to him "Ernest is the Police."
>
> Eric went on to tell officers that this statement from Johnny, Sr. was totally unsolicited and Johnny Sr. had just volunteered the information. Eric stated at the time, Johnny, Jr. was in his room at the house and was not present, Eric went on to tell officers that later he talked to Johnny, Jr. about what Johnny, Sr. had said and Johnny, Jr. stated "didn't I tell you that Ernest was working f~r the police."

On August 31, 1997, Pickens gave a statement to Vernon Sheriff s deputies, and answered their questions as follows:

> Q. Okay. Who told, uh, who told that Ernest was ratting people out or ...?
> A. Johnny.
> Q. How did he know?
> A. He said those dudes on Bishop told him.
> Q. On Bishop?
> A. He didn't say any names. He said some [people] on Bishop told me that Ernie was the one ratting us out.
> Q. He never even told you nobody else at any time, had he. ..he had learnt . ..that Ernest, that was the first that you knew that Ernest was ratting?
> A. Yeah, then I went over there and him and his daddy was talking about it. Q. What did they say?
> A. Talking about Ernest was turning people in, and that's why he ain't in jail right now. Cause he got a $70,000 bond.

Q. What did Evans, Sr. say about it?
A. That the only reason Ernest's out right now, is because he's turning people in.
Q. Did he say who he'd turned in, maybe you or anybody else?
A. He said, you and J.J. He say he turned ya'll in, that's why he's out right now.
Q. That was Johnny Evans, Sf. said this? A. Yes sir.
Q. And when was this here? A. It was like last week.
Q. Like last week? About what date, give me a date.
A. Like in the middle of the week, I don't even know what day it was. ..
Q. Where was ya'll at, when he told you this?
A. We was at his house.
Q. At Mr. Evans' house?
A. Yes sir.
Q. What was ya'll doing?
A. Johnny had went over there, cause he had his son. And he had to babysit that day, so we just went over there and I had my girlfriends little boy. So we went over there and let them play.
Q. Over to Johnny Evans, Sr.'s house?
A. Oh, huh, and his daddy was sitting there talking, talking to us about. ..
Q. How did it get brought up?
A. Cause he said, uh, how long you been smoking weed? That's how it came up, he asked me how long I been smoking weed, and I was like, I been smoking for awhile. Like that. ..then he was like, you know you can't come to DeRidder and smoke no weed, and people that don't like you, they gonna turn you in. Like that, then I was like, yeah. Look at Ernest Prater, he's turning everybody in.
Q. And Ernest, uh, Johnny Evans Sr. is the one that said that, told you and Johnny Evans Jr.? Was anyone else there with ya'll, when he told you?
A. No, just us three.

> Q. Just you three. And he told you that, he had turned you and several more. ..J.J.., who is he referring to as J.J. ?
> A. It's a dude named J.J. I don't know him, though.
> Q. But Johnny Evans, Sr. had told you that Ernest had turned you and J.J. in? '
> A. Uh huh. And he said it was some other people, he didn't name them other people.
> Q. But he said, he had turned some other people?
> A. Yes sir.

Hearsay statements may be admissible in an administrative hearing, provided the evidence is determined to be competent. *Chaisson, supra* at 382. Further, these two statements fall under the hearsay exception of La. C.E. art. 804(B)(3), as statements against interest. Even though he was not yet a suspect in Prater's murder , Pickens' first statement clearly indicated that he had a motive to kill Prater. Likewise, the second statement, taken after he became a suspect, again provided police with Pickens' motive to kill Prater . The court of appeal also found that the two statements lacked credibility and trustworthiness, pointing out what it considered to be inconsistencies in the statements.[6] Yet, having determined that the statements were

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[6] On the first inconsistency, the court of appeal reasoned as follows: Mr. Pickens stated that Johnny did not mention names. Instead, "He

[Johnny] said some [people] on Bishop told me that Ernie [Prater] was the one ratting us out." Not only does this underscore a critical inconsistency, but it also demonstrates that there could have been another source for his information other than Patrolman Evans. admissible, it was up to the Board, as the trier of fact, to determine the weight to give these statements and to determine whether they were inconsistent. Contrary to the court of appeal's reasoning, the Board could have concluded that the statements reflect that "Johnny," referring to Johnny Evans, Jr., made a statement to Pickens prior to the meeting at Evans' residence to the effect that people on Bishop Street told Johnny that Prater was a police informant. Rather than discredit Pickens, the Board could have concluded that it bolstered Pickens' credibility , because he told DeRidder Police on August 28, 1997 that after Evans told him the information and he in turn told Johnny, that Johnny said, "didn't I tell you that Earnest was working for the police?" Further, the fact that someone else told Johnny or Pickens that Prater was a police informant, in no way lessens Evans' responsibility not to disclose confidential information. The Board may well have concluded that a statement by a trusted and informed police officer would carry more

weight, and would more likely be accepted as true by Pickens and Johnny, than rumors heard on the street.

The court of appeal found a second inconsistency in determining that Pickens , statements were untrustworthy, that is, that in one statement he stated that Johnny was present when the disclosure was made, and in another statement he said that Johnny was not in the room when the disclosure was made. However, the Board could have found that both statements recite that Johnny and Pickens were at Evans' residence on the date the disclosure was made, and that Evans volunteered to Pickens that Pickens and "J.J." had been arrested because Prater had turned them into police. Further, even if inconsistent, it is the Board's responsibility to determine the weight of the evidence, which can only be reversed if manifestly erroneous. We find no manifest error here.

CONCLUSION

In administrative hearings involving civil servant disciplinary actions, evidence is admissible if it is competent and has a reasonable relevance to the issues before the board. This determination must be made on a case-by-case basis, and will not be

overturned unless manifestly erroneous. Although not 100% reliable, the results of a properly administered polygraph test are competent evidence and are of the type upon which reasonable persons would rely. Further, the two statements made by Pickens constituted exceptions to the hearsay rule as statements against interest under La. C.E. art. 804, and they were not so inconsistent as to be incompetent. Finally, the Board was made well aware of the reliability issues with both the polygraph and the two statements by Pickens, and was entitled to determine the proper weight to be given them. Thus, we defer to the factual conclusions of the Board, and we find that the Board's determination was based on legal cause and commensurate with the infraction, and was not arbitrary , capricious, or characterized by abuse of discretion.

DECREE

For the reasons stated herein, the judgment of the court of appeal is reversed and the judgment of the trial court is reinstated.

REVERSED; TRIAL COURT JUDGMENT REINSTATED.

SUPREME COURT OF LOUISIANA

No.2001-C-2466

JOHNNY M. EV ANS, SR.

VERSUS

DERIDDER MUNICIPAL FIRE AND POLICE CIVIL SERVICE BOARD

CALOGERO, Chief Justice, dissents.

The majority's opinion is based on the fallacy that an employer may simply terminate a civil service employee who refuses to submit to a polygraph examination. However, the lower court cases cited by the majority hold that refusal to submit to a polygraph examination may be deemed insubordination justifying dismissal only under certain circumstances. In Creadeur v. Dep't of Public Safety, Div. of State Police, 364 So. 2d 155, 157-58 (La. App. I Cir. 1978), the primary appellate court case relied upon by the majority, the court held that "as a general rule a police officer may be required to take a polygraph or similar test where the request is reasonable

and bears sound relationship to police work, lawful departmental policy or interdepartmental matters, but that the rule is not absolute and is subject to the exception of reasonableness under the circumstances of each case." Notably, in Creadeur, which relied on Roux v. New Orleans Police Dep't, 223 So. 2d 905 (La. App. 4th Cir. 1969), the appellate court, in determining the reasonableness of the request, was especially impressed with the appointing authority's testimony that the officer was informed when he was asked to submit to the examination that the results thereof would not be used to discharge the officer "or anything like that but to channel the investigation, to show us in what direction to follow." 364 So. 2d at 156. Not only are the results of the polygraph examination being offered by the appointing authority to justify Officer Evans's dismissal in the instant case, the majority also appears to hold today that mere refusal to submit to an examination can justify dismissal in and of itself. Even if that holding were correct, it is one thing to allow an employer to terminate for insubordination a civil service employee who refuses to submit to a polygraph examination, and it is quite another to say that polygraph examination results may be

admitted as competent evidence in a judicial or even quasi-judicial proceeding against the employee to justify his dismissal. Because I disagree that the one necessarily follows the other, I respectfully dissent from the majority's holding today.

As the majority notes, the issue in this case is whether the polygraph examination results may be reasonably found to be competent evidence admissible in an administrative proceeding. The fact that an employee may be fired for insubordination under special circumstances for refusing to submit to a polygraph examination does not make polygraph results legally competent evidence. I do not disagree that it might appear incongruous to the casual observer to allow the appointing authority to require an employee to submit to a polygraph examination or else be terminated, but then not allow the results of the examination in evidence at an administrative hearing to justify the decision to dismiss the employee. Yet, the majority concedes that the results of the examination would not be admissible in a criminal trial against the police officer. To my mind, the same reasons for not allowing such evidence in a criminal or civil proceeding militate against allowing , such evidence in an

administrative proceeding, where, as the majority concedes, lay persons are frequently involved. Ante, p. 8.

I find the reasons for disallowing polygraph examination or stress test results in criminal cases to be relevant to the instant case. As the majority notes, in State v. Catanese, 368 So.2d 975 (La. 1979), we set forth several policy reasons for not allowing such evidence in criminal trials: (I) the fact-finder would give conclusive weight to the polygraphist's opinion; (2) the reliability of the examination results depends solely on the polygraphist's skill; and (3) no extensive procedural safeguards exist governing the admission of polygraph results. The majority addresses none of these policy considerations specifically; instead, the majority states generally that administrative proceedings should be treated differently than ordinary trials for various reasons and that police officers hold a position of public trust. However, there is no indication here that the proceeding before the Board meets any of the majority's stated conditions for treating evidentiary issues regarding polygraph examinations differently than we treat such issues in ordinary criminal or civil trials. The Board here was merely adjudicating a

dispute between the appointing authority and the civil servant, and there is no suggestion that it was composed of non-lawyer members who had any expertise in polygraph results. Elsewhere, the majority, presumably in addressing the Catanese policy reasons, simply concludes that the Board gave proper weight to the polygraph examination results and observes that the licensed polygraphist was extensively cross-examined by counsel, ostensibly establishing the reliability of the witness's interpretation of the polygraph measurements. The fact remains that the Board in this case functioned as any other jury might in determining the credibility of a party and the weight to give the testimonial evidence.

In my view, the court of appeal had it right on a number of points. In this case, the dispute was between the internally-conflicting, self-serving hearsay statements of a convicted killer tone statement of which contained hearsay-within-hearsay of still another convicted murderer, and the testimony of a police officer with no prior disciplinary infractions who denied divulging confidential information to his son or Pickens, and who, in fact, had previously turned his son in to law enforcement authorities on drug charges. As

the court of appeal reasonably found, the Board clearly relied on the polygraphist's testimony and his interpretation of the results of his examination of the police officer employee to overcome the weak hearsay evidence against the officer and to justify the appointing authority's decision. The lay board members simply adopted the "lie detector" test results to find that the officer was not credible, thereby giving conclusive weight to "developing and inexact" scientific evidence, a result we explicitly warned against in Catanese.

The court of appeal next pointed out the questionable reliability of polygraph results. As the majority itself notes, the physiological measurements are fairly straightforward and "[i]t is up to the examiner to determine the suitability of the subject for testing, to formulate proper test questions, to establish the necessary rapport with the subject, to detect attempts to mask or create reactions on the chart, and to interpret the charts." Ante, p. 2, n. 1. Although polygraphists might now be licensed and subject to certain professional requirements since our decision in Catanese, the fact remains that the reliability of the test results is entirely dependent upon the skill and the subjective decisions of the examiner, who, as

the Supreme Court has recognized, is effectively giving his opinion on the subject's truthfulness or deception on another occasion without any knowledge of the relevant facts. United States v. Scheffer., 523 U.S. 303 (1998). Moreover, as the appellate court observed, the witness's opinion testimony is based on the subject's physiological responses, which have not been scientifically proved to be causally related to truthfulness or deception. Evans v. DeRidder Municipal Fire and Police Bd, 01-118, pp. 5-6 (La. App. 3 Cir. 6/27/01), 789 So.2d 752, 757-58. Justice Knoll in her concurrence recognizes the science as "developing and inexact." Tellingly, the majority makes no mention of whether the state of the science justifies accepting polygraph results today as reliable evidence in a judicial or quasi-judicial proceeding. Instead, the majority simply notes that the witness was cross-examined as to possible inaccurate test results.

Finally, the majority, as Justice Weimer apparently recognizes in his concurrence, neglects to impose any restrictions or even basic evidentiary guidelines , on the admissibility of polygraph test results in civil service proceedings, despite our cautionary

language in Catanese, The rationale of Chaisson v. Cajun Bag & Suply Co.,97-1255 (La. 3/4/98),708 So. 2d 375, discussed by the majority simply does not provide the "extensive procedural safeguards" we said in Catanese would be necessary for polygraph examination results to be admitted in evidence.

The majority opinion, when it comes down to its essence, simply turns on the facile logic that a civil service employee may be fired for insubordination for refusing , to submit to a "lie detector" test, ergo the appointing authority should be able to . introduce the results in a civil proceeding to justify a decision to dismiss the employee when the results of that test are negative. In Catanese, we recognized that polygraph examination results might be admissible in a post-trial setting to determine whether anew trial should be granted, that is, in circumstances where the defendant's guilt or innocence is not at issue and the trial judge decides both the admission of the evidence and the weight to give it. I understand our reasoning there to suggest that polygraph examination results might have a role to play in the search for truth, as opposed to simply being the final arbiter on truth or deception. Clearly the Creadeur court

recognized as much. Thus, it is not illogical to allow an appointing authority to require under reasonable circumstances that the civil servant submit to a polygraph examination in the authority's search for the truth, i.e., as an investigative tool, yet not permit the subsequent introduction of the negative results of such an examination in a quasi-judicial proceeding to prove that the civil servant was deceptive on a particular occasion" and thus conclusively determine the civil servant's credibility, a role best left to the fact-finder unencumbered by questionably-reliable opinion testimony.

Based on the foregoing reasons, I would affirm the court of appeal's finding that the Board erred in allowing in evidence the testimony of the polygraphist regarding his interpretation of the results of the polygraph examination.

SUPREME COURT OF LOUISIANA

No.2001-C-2466

JOHNNY M. EV ANS, SR.

VERSUS

DERIDDER MUNICIPAL FIRE AND POLICE CIVIL SERVICE BOARD

KNOLL, Justice, concurring.

It is with great reluctance that I concur with the majority's holding allowing the admissibility of polygraph test results in the administrative review of a termination decision. First, I wish to underscore that the use of such evidence is confined to administrative proceedings, and in no way can it be used in criminal trials. *See State* v. *Catanese,* 368 So.2d 975 (La. 1979).

Furthermore, I feel compelled to caution against expanding the role of polygraph tests, the administration and interpretation of which is recognized to be "a developing and inexact science." *See, e.g., United States* v. *Gilliard,* 133 F .3d 809, 812 (1lth Cir. 1998), citing *United States* v. *Piccinonna,* 885 F.2d 1529, 1535 (llth Cir. 1989). Just as the majority of the court recognizes that admissibility

of polygraph evidence is limited to the type of administrative proceedings utilized in this case, the majority also notes that plaintiffs employer, Chief Malone, sought polygraph evidence as a last resort, a second point which merits additional emphasis.

The majority observed that Pickens and Johnny "both invoked their Fifth Amendment privileges and refused to testify. ...Chief Malone testified that, because of the conflicting statements by Pickens and Evans, he ordered Evans to take a polygraph " *Evans v. DeRidder Mun. Fire and Police Civ. Svc. Bd.*, 01-C-2466, p. 3 (La. 2002), ____So.2d ____, _____.Thus, with Pickens and Johnny unavailable to testify, Chief Malone was left in a precarious position. On the one hand, allegations of profound misconduct were made against one of his officers, a person in a position of great public trust, and on the other hand, to learn the truth, Chief Malone had only hearsay statements and the conflicting word of the officer .

To get to the heart of matter, Chief Malone resorted to a polygraph test. It was a last resort, and the majority's opinion indicates that the evidence garnered from the test could not alone decide the matter: "It is province of the Board to determine the

weight to be given this evidence. *Further, in this case, the Board had other evidence to support the allegation that Evans disclosed co1lfidential information." Evans, 01-* C-2466, p. 10, ____ So.2d at _____ (emphasis added).

Accordingly, the majority saves for another day the question of whether polygraph evidence alone could justify a termination decision, or indeed, justify by itself any other governmental action. Even so, the point should not be lost that in the instant case, this court sanctioned the initial step, i.e., the decision to administer a polygraph test, only after finding that the proponent of the test was left with no other viable options. In so doing, while finding polygraph evidence admissible under these limited circumstances, the majority's holding can be said to stand for the proposition that future efforts to employ machinery to diagnose human veracity should likewise be employed rarely and sparingly. However, I would not leave this significant caveat to be implied, but would explicitly so hold.

SUPREME COURT OF LOUISIANA

No.2001-C-2466

JOHNNY M. EV ANS, SR.

VERSUS

DERIDDER MUNICIPAL FIRE AND POLICE CIVIL SERVICE BOARD

WEIMER, J., concurring.

I concur with the majority opinion, but note the well written and thorough opinion of Judge Woodard which found the polygraph test results inadmissible. **Evans v. DeRidder Municipal Fire & Police Civil Service Board,** 01-0118 (La.App.3 Cir. 6/27/01),789 So.2d 752, writ granted, 01-2466 (La. 12/14/01),803 So.2d 977. I am persuaded to concur because a law enforcement officer can be terminated from employment for failure to submit to a polygraph test. **Creadeur v. Department of Public Safety, Division of State Police**, 364 So.2d 155 (La.App. 1 Cir. 1978), and cases cited therein.

It logically follows that the appointing authority can consider termination based on the officer's failing the polygraph test. It would

be incongruous to then rule that one could not introduce evidence used in helping make the determination to terminate the officer's employment. Nevertheless, the determination of who is telling the truth is a sacred determination. The polygraph test is merely a tool to assist the fact finder. Fact finders must be wary not to abdicate the responsibility for determining the truth to a machine or to the expert who operates the machine.

Further, I note that in **Creadeur**--a case cited by the majority--the appellate court held that as a general rule a police officer may be required to take a polygraph or similar test where the request is reasonable and bears sound relationship to police to the exception that one is not required to submit to an order to take a polygraph test which is unreasonable or when a legitimate reason exists for refusal to obey such an order. ***Id.*** at 157 .See also, **Jackson v. Department of Health and Hospitals, Office for Citizens with Developmental Disabilities**, 98-2772, p. 8 (La.App. 1 Cir. 2/18/2000), 752 So.2d 357,363.

Certainly, in the instant case, the reasonableness criteria noted in **Creadeur** is satisfied.

I also note that Officer Evans testified and the fact finder had the opportunity to evaluate his credibility.